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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 254

ROCK CREEK PLAZA, INC., PETITIONER

v.

JULIAN H. ZIMMERMAN, COMMISSIONER OF THE FEDERAL HOUSING ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Columbia (Pet. App. 1a-16a) is reported at 164 F. Supp. 269. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 18a-19a) is reported at 266 F. 2d 695.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1959 (Pet. App. 20a). The petition for

a writ of certiorari was filed on July 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In 1952, the Federal Housing Administration authorized petitioner's FHA-insured housing project to use a limited number of its units for transient purposes, subject to certain conditions. When petitioner violated these conditions, the FHA terminated the agreement. The question presented is whether Section 513 of the National Housing Act, added in 1954, conferred the right on petitioner to rent those facilities to transients without regard to, and in violation of, the specified conditions.

STATUTE INVOLVED

Section 513 of the National Housing Act, as added, 68 Stat. 610, 12 U.S.C. 1731b, provides in pertinent part:

> (a) Intent of Congress.
>
> The Congress declares that it has been its intent since the enactment of this chapter that housing built with the aid of mortgages insured under this chapter is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.
>
> (b) Exceptions to prohibition.
>
> Notwithstanding any other provisions of this chapter, no new, existing, or rehabilitated multi-

family housing with respect to which a mortgage is insured under this chapter shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis).

STATEMENT

The Federal Housing Commissioner brought this action to enjoin petitioner from operating its multi-family housing project as a hotel, from renting any of the project units for any term less than one month until such time as the Federal Housing Administration (FHA)-insured loans on the project have been paid off, and from charging rent for any unit in excess of the monthly rental schedule approved by the FHA.

The facts, as found by the district court and not challenged here, may be summarized as follows: in February 1949, petitioner filed applications for mortgage insurance under Section 608 of the National

Housing Act, as amended, 12 U.S.C. 1743, for two projects, each described as an "eight story apartment" with more than 500 "family units" to be located at 3616 - 16th Street, Northwest, Washington, D.C.[1] The FHA issued commitments of insurance to the proposed mortgagee in March 1949.

As required by the FHA, petitioner adopted a charter under the terms of which petitioner's business activities were limited to the construction and operation of rental housing projects as long as an FHA-insured mortgage encumbered the properties (Pet. App. 4a). This limitation was consistent with the FHA interpretation of the National Housing Act as precluding the insuring of projects which were to be used for transient rentals (Pet. App. 5a).[2]

After petitioner obtained an excavation permit from the District of Columbia, it commenced excavation with the FHA's consent (Pet. App. 5a-6a). Under FHA practice, however, no advances to petitioner could be insured until petitioner also obtained a building permit from local authorities for the construction of an apartment. Accordingly, in May 1949, petitioner sought District of Columbia permis-

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[1] As subsequently constructed, the two apartment projects are separated by a one-inch strip of caulking compound, but are operated as a single unit known as the "Woodner" (Pet. App. 4a).

[2] Commencing in 1938, the FHA issued directives to its field officers, prohibiting transient rental in FHA projects (Pet. App. 5a). The validity of the administrative construction of the statute was recently sustained by this Court in *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84.

sion to construct an apartment building. Plans furnished with the application indicated that petitioner intended to use certain space within the building for commercial adjuncts (Pet. App. 6a).

Under the then existing District of Columbia zoning regulations, a hotel license was required for accommodations which had such commercial adjuncts. Some time after its submission, petitioner's application was therefore revised to show that the building was to be used for an apartment-hotel. A supplemental application for a building permit was filed also showing that the building was to be used for an apartment-hotel (Pet. App. 6a). Notwithstanding the change in the application, the District of Columbia issued a building permit for an apartment, rather than an apartment-hotel. On the basis of the permit, the FHA endorsed the loan for insurance (Pet. App. 7a).

The first indication to the FHA of petitioner's intention to conduct a hotel operation came in the summer of 1951 when the FHA local director was informally advised that petitioner had hired a hotel manager. At that time, the local director advised petitioner that FHA-insured hotel facilities and services were not contemplated under the National Housing Act. Not until January 1952, when petitioner's project was nearing completion, did it advise the FHA of its intent to operate as a hotel and of the necessity of securing a hotel license if the commercial adjuncts, which had been included in the original application to the FHA, were to be used. The FHA did not previously know of the District of Columbia zoning

requirement for a hotel license for housing accommodations containing commercial adjuncts (Pet. App. 7a).

While the FHA at first refused to permit petitioner to engage in transient rentals, in August 1952 the FHA changed its position and entered into an agreement with petitioner permitting the petitioner to use 250 apartments for transient guests. The agreement between petitioner and the FHA provided that petitioner would not advertise as a hotel, would not use bellboys, and would not remove any kitchen equipment from the premises (Pet. App. 8a-9a). It was further agreed that the approval of transient rentals "shall be effective only so long as such transient use is required by the zoning authorities of the District of Columbia as a prerequisite to commercial use of the commercial facilities" (Pet. App. 9a). Thereafter, petitioner applied for and secured a hotel license from the District of Columbia (Pet. App. 10a).

From the outset of its operation of the project, petitioner violated its agreement by employing bellboys and by advertising in an effort to attract transient trade (Pet. App. 10a). Moreover, the petitioner also violated the agreement of August 1952 by failing to apply to the District of Columbia in good faith for permission to operate its commercial adjuncts without a hotel license (Pet. App. 12a), after the relevant zoning regulation was revised in 1954 (Pet. App. 10a). The revised regulation, which had been drafted for the benefit of the Woodner and another apartment, with the assistance of an attorney who had been in petitioner's employ from the beginning

of the project, permitted apartment buildings to operate commercial adjuncts such as those in the Woodner (Pet. App. 10a).

The FHA declared the agreement terminated because of petitioner's breaches of contract and, on April 20, 1955, ordered petitioner to cease its hotel and transient operations (Pet. App. 12a). After the refusal of petitioner to comply with this order, the present suit was instituted (Pet. App. 12a-13a).

The district court held that petitioner's right to use its project for transient rentals was dependent solely upon the permission given by the FHA in the August 1952 agreement, since the original charter prohibited all transient rentals (Pet. App. 13a). Moreover, Section 513(b) of the National Housing Act, *supra*, pp. 2-3, provided that only owners who had secured permission to rent to transients from the FHA before May 28, 1954, could continue to rent to transients. The court concluded that this section was intended by Congress to confirm existing agreements between the FHA and mortgagors under the Act and was not intended to create rights beyond those agreed to contractually by the FHA in this manner (Pet. App. 14a-15a). But the court found that the agreement had been substantially breached in that petitioner (1) had used bellboys; (2) had advertised as a hotel; and (3) had failed and refused to seek permission under the new zoning regulations to operate the premises involved without a hotel license[3] (Pet. App. 13a-14a). Accordingly, the court

[3] The court found that petitioner's failure to notify the FHA of the District of Columbia zoning regulations until

determined that the FHA had justifiably terminated the contract, leaving petitioner without any legal right to make transient rentals (Pet. App. 13a-14a). The district court, therefore, granted the injunctive relief sought by the FHA, prohibiting petitioner from operating the project for transient or hotel purposes for as long as the mortgage loans on the project are FHA-insured and requiring petitioner to make the premises previously reserved for transient and hotel purposes available for residential use on or before October 31, 1959 (Pet. App. 16a-17a).

The court of appeals, in a *per curiam* opinion, affirmed the decision of the district court (Pet. App. 18a-19a).

ARGUMENT

The sole contention of petitioner in this Court is that under the terms of Section 513(b) of the National Housing Act, *supra*, pp. 2-3, which was added in 1954, it is now free to operate its project for transient or hotel purposes in complete disregard of any of the conditions contained in its agreement with the FHA in 1952, except that condition limiting the

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the Woodner was almost completed "was an act of bad faith" "calculated to place FHA under pressure to permit transient rentals" (Pet. App. 12a) and that its failure and refusal to seek permission under the new zoning regulations to operate as an apartment building was "not made in good faith" (Pet. App. 14a; see Pet. App. 12a). Since petitioner was "engaged in a pattern of conduct which was calculated to defeat the purposes of the National Housing Act," the court concluded that "There are no equities in favor of" petitioner (Pet. App. 15a).

number of rooms which can be used for transients. By this line of argument, petitioner seeks to escape the unchallenged holdings of the courts below that the petitioner violated the terms of its 1952 agreement with the FHA, pursuant to which the FHA gave petitioner conditional permission to use up to 250 units for transient accommodations. It is plain, we submit, that the courts below were correct in rejecting this contention. Moreover, there is no conflict of decisions. Accordingly, further review by this Court is not warranted.

The premise underlying petitioner's argument is that Section 513(b) of the National Housing Act was intended to place on a parity with hotels those projects under Section 608 of the National Housing Act (12 U.S.C. 1743) which had received permission to make transient rentals on a limited basis. The language of Section 513, as well as its legislative background, shows to the contrary that the purpose of the section was to make it clear that the National Housing Act never contemplated the financing of hotels, motels, or other transient facilities. See *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84. Indeed, its legislative history makes it clear that Section 513 resulted from complaints of representatives of the hotel industry that many Section 608 rental housing projects were catering to transients in competition with hotels. See *Hearings Before the House Committee on Banking and Currency on H.R. 7839*, 83rd Cong., 2d Sess., pp. 507-515; *Hearings Before the Senate Committee on Banking and Currency on S. 2889, 2938, 2949*, 83rd Cong., 2d Sess., pp. 654-661. While the committees of both

Houses of Congress agreed that it had never been contemplated that an FHA-insured project could provide transient accommodations, it was also agreed that Congress should clarify its intent by expressly prohibiting transient occupancy. See H. Rept. No. 2271, 83rd Cong., 2d Sess., pp. 77-78. Thus, in Section 513(a), *supra*, p. 2, Congress specifically declared that, since the enactment of the National Housing Act, it had been the legislative purpose "that housing built with the aid of mortgages insured under the Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding." Recognizing, however, that in a few instances mortgagors had, prior to 1954, applied for and received permission from the FHA to rent to transients, Congress in Section 513(b) carved out an exception to the prohibition against transient rentals in order to preserve the privileges which the FHA (perhaps erroneously) had purported to grant.

There is nothing in Section 513(b) to suggest that, notwithstanding the general congressional purpose to eliminate the practice of transient rentals, mortgagors in petitioner's situation now enjoy a *greater* latitude to engage in that practice than had been previously sanctioned either by the National Housing Act or by his contract with the FHA. Moreover, petitioner's contention that Section 513(b) was designed to place it (and other Section 608 mortgagors who had received permission to rent to transients prior to May 28, 1954) on a complete parity with hotels is, of

course, negated by the provision in Section 513(b) limiting the number of accommodations available for transients to the number previously approved by the FHA.

In short, after, as well as before, the enactment of Section 513, petitioner's right to rent to transients was dependent upon the agreement between it and the FHA, and was subject to the conditions therein. Since, as the district court found, petitioner flagrantly violated the conditions imposed by the FHA, petitioner's contractual right to rent to a limited number of transients expired. The FHA was therefore entitled to the injunctive relief which was granted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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